STATE OF ALASKA (HARVEY POOTOOGOOLUK)

IBLA 89-258 Decided

Appeal of a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application F-65974 and dismissing a protest filed by the State of Alaska.

Set aside and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Alaska Native Claims Settlement Act: Easements: Access--Contests and Protests: Generally--Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Protests

   The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Alaska Native Claims Settlement Act: Easements: Access--Contests and Protests: Generally--Rules of Practice: Protests

   The Bureau of Land Management has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

APPEARANCES: Bonnie E. Harris, Esq., Department of Law, Anchorage, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska has appealed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated February 7, 1989, approving the application of Harvey Pootoogooluk (F-65974) to receive land under the Native Allotment Act (34 Stat. 197 (1906), codified as amended at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed 43 U.S.C. § 1617(a) (1988)) and dismissing a protest filed by the State under subsection 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 98-487, 94 Stat. 2371, 2435, codified at 43 U.S.C. § 1634(a)(5)(B) (1988).

The land at issue is a 160-acre parcel near the northern tip of a barrier island which forms part of the northwest coast of the Seward Peninsula on the Chukchi Sea. The parcel extends from seaside across the island to Shishmaref Inlet in portions of secs. 9, 16, and 17, T. 13 N., R. 28 W., Kateel River Meridian. It is easiest identified on many maps as the location of the village of Kividlo. Although it seems that no village now exists at the site, the land contains the remains of subterranean houses which date to the 19th century and graves that may be from the same period. 1/

In response to publication of notice of Pootoogooluk's application pursuant to the settlement of Barr v. United States, Civ. No. A76-160 (D. Alaska), the State filed its protest with BLM on April 23, 1985. 2/

1/ Orth, Dictionary of Alaska Place Names 528 (U.S. Government Printing Office, 1971 reprint), identifies Kividlo as an Eskimo camp reported in 1950 by the Geological Survey. See also Field Report dated Aug. 15, 1988; Statement of Reasons (SOR), Exh. 6.

2/ The Barr litigation concerned Native allotment applicants who submitted applications to RuralCAP workers who did not timely file them with the Department. See National Park Service, 117 IBLA 247, 248 n.1 (1991). Pursuant to a settlement approved by the court on Oct. 8, 1982, the applications are deemed to have been timely filed if they were completed prior to Dec. 18, 1971, the date of repeal of the Native Allotment Act. Id. Pootoogooluk's application is dated Jan. 4, 1971. It bears date stamps showing that it was received by the Nome Agency on July 18, 1974, by the Fairbanks Land Office on Nov. 26, 1974, and by the Branch of Land and Minerals Operations in Anchorage on Apr. 11, 1980. Two other documents, one a land description and map and the other a certification by three individuals dated Jan. 4, 1971, bear the same date stamps of the Fairbanks Land Office and Land and Minerals Operations, but not that of the Nome Agency. A photocopy of the application was received by the Branch of Land and Minerals Operations on Dec. 5, 1979, and assigned the number AA-37812. The document which was copied bore the Nome Office date stamp but not that of the Fairbanks Land Office. Copies of the other two documents were not filed at that time and, consequently, the application lacked a description of the lands sought. File number F-65974 appears to have been assigned in 1983 when Pootoogooluk filed a "Fanny Barr" petition.

The protest referred to ANILCA subsection 905(a)(5)(B) under which a Native allotment application is not legislatively approved under 43 U.S.C. § 1634(a)(1) (1988) if:

> The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist * * *.

43 U.S.C. § 1634(a)(5)(B) (1988). The State's letter said that the allotment was one of three which "conflict with sites or trails necessary for access," and noted that the State was "prepared to withdraw individual protests if a BLM survey establishes that a conflict does not exist." On a separate page addressing Pootoogooluk's application, the State repeated much of the statutory language and asserted: "A trail from Wales to Cape Espenburg crosses the land described in the allotment application. No reasonable alternate access exists because the land is bounded by the Chukchi Sea on one side and Shishmaref Inlet on the other." The State went on to say:

> The purpose of this protest is to protect access to public lands and resources. If the allotment applicant relinquishes an easement for the trail, the State will withdraw this protest. Otherwise, the effect of this protest is to require that the application be adjudicated for compliance with the 1906 Alaska Native Allotment Act. In the course of such an adjudication, the allotment, if valid, should be issued subject to an easement for the trail.

Because the parcel is within the Bering Land Bridge National Park and Preserve, BLM concluded that the application had not been legislatively approved under ANILCA subsection 905(a)(1), but was to be adjudicated as

fn. 2 (continued)

Under cover letter dated Aug. 19, 1983, Alaska Legal Services Corporation filed documents it described as sufficient "to publish the name and legal description of Harvey Pootoogooluk as a potential class member pursuant to Paragraph VII of the Stipulation of Settlement in Barr v. United States." Although several documents in the case file suggest that Pootoogooluk was a party to the litigation, the file does not contain a copy of the settlement or other documentation showing that he was found to be a member of the class and entitled to benefit under the settlement. The State's protest indicates that, as of the date it was filed, there remained an issue "as to which allotment applicants may be eligible class members." Id. at 2.

required by subsection 905(a)(4), 43 U.S.C. § 1634(a)(4) (1988). A field examination was conducted June 27, 1988. Relying on the examiner's report, BLM approved the application, finding that Pootoogooluk had met the use and occupancy requirements of the Native Allotment Act. BLM dismissed the State's protest because, "[b]ased on a review of the case file, topographic maps, field reports, and easements reserved pursuant to Sec. 17(b) of ANCSA [Alaska Native Claims Settlement Act], it was found that travelers use the active beach in front of the allotment or travel across the marshland on the lagoon side of the allotment."

On appeal the State argues that BLM "had no authority to dismiss a state protest simply because it disagreed with the factual basis of the protest" (SOR at 6). Rather, the State contends, ANILCA gives the State "sole responsibility for protecting public access that might be affected by conveyance of Native allotments" and only the State can determine when public access is threatened by an allotment. Id. The State also argues that BLM erred in concluding that no trail crosses the allotment land (SOR at 2-6). In support of this argument, the State quotes and provides copies of several documents which it claims show the existence of and need for the trail. Because the trail at issue is a winter trail, the State also faults BLM's reliance on the conclusion of the field examination, conducted during the summer, that travelers use the beach in front of the allotment and the marshland on the other side of Shishmaref Inlet.

In response, BLM asserts that the Board has already ruled that the Bureau has authority to review the sufficiency of an ANILCA protest filed by the State of Alaska (Answer at 5-6). BLM contends that it correctly concluded that a permanent winter trail does not cross the allotment and that there is adequate alternative access (Answer at 6-11). BLM also argues that, even if it erred in dismissing the protest, further relief is not available because BLM has already adjudicated the application (Answer at 11). Finally, BLM contends that, because the allotment is within the Bering Land Bridge National Park, there is no State land that could be adversely affected by the decision and, consequently, the State lacks standing to appeal (Answer at 12).

[1] BLM's argument as to standing is based on a mistaken assumption that the State of Alaska must hold an ownership interest in land to be adversely affected by a decision. See 43 CFR 4.410(a); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). As recognized by Congress in enacting section 905(a)(5)(B), the State has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. The protest filed by the State is clearly directed toward protecting such an interest. Whether the State is correct that a winter trail from Wales to Cape Espenburg crosses the allotment and is necessary for access goes to the merits of the appeal. The State's standing to appeal does not depend upon the likelihood of its ultimate success on appeal. See California State Lands Commission, 58 IBLA 213, 217 (1981). Its protest, supported on appeal by the documents on which

it based its claim, presents sufficient and colorable allegations that its interests will be adversely affected by BLM's decision. In addition, the State would have a right to appeal dismissal of its protest for procedural reasons. Cf. Eugene M. Witt, 90 IBLA 330, 336 (1986); Eugene M. Witt, 90 IBLA 265, 272 (1986).

[2] BLM is correct that the Bureau has authority to review the sufficiency of a protest and dismiss a protest which it finds to be insufficient. State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988); State of Alaska, 95 IBLA 196 (1987); United States v. Mary S. Napouk, 61 IBLA 316 (1982). A review of these decisions, however, also indicates that the State is correct that BLM's disagreement with the facts asserted in a protest is not a proper basis for dismissing it. The protest filed in United States v. Mary S. Napouk, supra at 322, identified a tract of land different from that applied for by the Native applicant and therefore was legally insufficient to qualify as a protest of the application. Similarly, in State of Alaska (Elliot R. Lind) (On Reconsideration), supra, although the State argued that BLM lacked authority to adjudicate the factual accuracy of a section 905 protest, the question reviewed and ruled upon by the Board was whether the protest had been made with the specificity required by 43 U.S.C. § 1634(a)(5)(B) (1988). Id. at 15.

The standards for review of protests filed under section 905 were identified in State of Alaska, supra. The statute requires that a protest include three affirmative statements:

> (1) a statement that the land described in the allotment application is "necessary for access" to certain public (State or Federal) lands, resources, or bodies of water as enumerated in the statute; (2) a statement setting forth with specificity the facts upon which the conclusions concerning access are based; and (3) a statement that "no reasonable alternatives for access exist."

Id. at 200. Affirmative statements in the words of the statute satisfy the first and third requirements. Id. As to the specificity of the facts to be alleged under the second requirement:

> [A] State protest will be considered sufficient if it specifies the nature of any use of the lands subject to a Native allotment application for purposes of gaining access to any public lands, resources, or bodies of water, which could be jeopardized by conveying the land out of public ownership.

Id. at 201. Authority to review and dismiss a protest concerns its legal sufficiency rather than the truth of the facts asserted as grounds for the protest.

The protest filed by the State in this case was sufficient to comply with ANILCA subsection 905(a)(5)(B). It stated that the allotment was in conflict with a trail "necessary for access" and specifically asserted that a trail from Wales to Cape Espenburg crossed the land. It also claimed that

no reasonable alternate access existed and gave a reason in support of that conclusion. The consequence of the filing of a legally sufficient protest is to require that the application be adjudicated under the Native Allotment Act. State of Alaska (Molly Tocktoo), 118 IBLA 1, 6 (1991); State of Alaska (Elliot R. Lind) (On Reconsideration), supra at 16; State of Alaska, supra at 202. BLM's argument that even if it had erred further relief is not available is of no avail. The right to file a protest and obtain adjudication of an Native allotment application is of little consequence if the adjudication does not include investigation of the factual issues raised by the protest. Cf. Eugene M. Witt, supra at 336-37.

The State's protest claimed the existence of a trail from Wales to Cape Espenburg. 3/ As shown on appeal, the protest was based on the recommendation of the Federal-State Land Use Planning Commission for Alaska to reserve "[a] 25-foot easement for an existing access trail from Wales to Cape Espenberg via the Shishmaref coast," and its finding that there was "an existing winter trail heavily used by the public for intervillage travel and access to public land" (SOR, Exh. 3, at 2). In a draft memorandum the State Director recommended that the easement be reserved from lands to be conveyed to the Village of Shishmaref because:

> This trail is an important component of the Seward Peninsula intervillage trail system. This trail is essential to provide for public travel between the village of Wales to the south and Cape Espenberg to the north. This trail provides access to public lands to the east and west. The trail is located on the beach above mean high tide [line]. If ice conditions prevent use of this trail alternate access can usually be gained by using the lagoon/inlet ice or the sea ice. An interview on November 14, 1979 at Shishmaref indicated this trail is used yearly, ice conditions permitting. The Shishmaref Land Committee okayed this easement at their meeting of February 5, 1980.

(SOR, Exh. 4, at 5-6). Subsequently, the easement was reserved in the interim conveyance of lands to the Shishmaref Native Corporation (SOR, Exh. 2, at 7).

As recited in the decision, after a review of various maps and the field report, BLM found that a trail does not cross Pootoogooluk's allotment. These documents were not sufficient, however, to resolve factual questions raised by the protest as to whether there is a need for access across the land and whether reasonable alternative access exists. 43 U.S.C. § 1634(a)(5)(B) (1988). Although the maps do not show a winter trail, numerous maps of the area show several villages to exist (or, like Kividlo, to have existed) along the coastline between Shishmaref and Cape Espenberg.

3/ Although the protest, BLM's decision, the parties on appeal, and this opinion use the term "trail," the term is not used to refer to a path but to a winter travel route. Because the land is near the Arctic Circle, it is unclear whether winter travel would leave any permanent evidence of use.

Maps are useful only to the extent they accurately represent the territory mapped. See Outline Oil Co., 95 IBLA 255, 259 (1987). Whether or not any villages exist, the township plat shows a number of Native allotments have been filed for land along the barrier island and across Shishmaref Inlet. Other Native allotments have been filed for land in other townships along the coastline. See, e.g., State of Alaska (Molly Tocktoo), supra. Those who use the land during the winter reach it by dogsled or snowmobile and must have access from Shishmaref and other places. The question is whether they travel along the coastline, in particular across Pootoogooluk's allotment, or follow some other route. Because BLM did not examine this issue in response to the protest, its decision must be set aside and the case remanded. State of Alaska (Molly Tocktoo), supra at 6.

We decline to order a hearing or specify a fact-finding procedure BLM should follow on remand. Documents BLM has submitted on appeal suggest that travel does not cross the allotment. While they may be considered on remand, they were not part of the record upon which the decision before us was based.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed is set aside and remanded for action consistent with this decision.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge